REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 48 OF 2018

JULIUS ODHIAMBO OTIENO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat Magistrate in Rongo Magistrate's Court Criminal Case No. 300 of 2017 delivered on 27/06/2017)

JUDGMENT

1. **Julius Odhiambo Otieno,** the Appellant herein, was charged with the offence of **Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006 and with an alternative offence of **committing an indecent act with a child**. The Appellant denied both counts.

2. The particulars of the offence of defilement were that '*on 21st day of June 2017 at [particulars withheld], intentionally caused your penis to penetrate the vagina of LA a girl aged 8 years old*'.'

3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.

4. Five witnesses testified in support of the prosecution's case. **PW1** was the victim one **LA.** The mother and father to the victim testified as **PW2** and **PW3** respectively. A Clinical Officer attached to Rongo Sub-County Hospital testified as **PW4.** The investigating officer one **No. 105386 PC Elizabeth Chemwo** attached to Kamagambo Police Station testified as **PW5**. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for the victim (PW1) whom I will refer to as '**the complainant'**.

5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave a sworn defence and called his mother and father who testified as **DW2** and **DW3** respectively. Thereafter the court rendered its judgment on 27/06/2018 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to life imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal on 11/10/2018 (albeit out of time and without leave of this Court) in challenging the judgment on the following five grounds: -

> ***1. The trial magistrate erred in law and in fact in relying on unreliable evidence on identification and/or of dock identification of the appellant which evidence was worthless and not credible in the circumstances of the case.***
>
> ***2. The trial magistrate erred in law and in fact in convicting the appellant on the uncorroborated evidence of the complainant.***
>
> ***3. The trial magistrate erred in law in rejecting the alibi defence offered by the defence which evidence was not displaced by the prosecution through cross - examination or otherwise.***
>
> ***4. The charges laid were bad in law and the offence of defilement was not proved to the required standard.***
>
> ***5. The sentence was manifestly excessive in the circumstances.***

7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant's Counsel **Mr. Oduk** expounded on the grounds of appeal. In contending the assailant was not adequately identified Counsel for the Appellant referred to **Robert Wanjau Maina vs. Republic (2015) eKLR** and **Walter Abongo Amolo vs. Republic (1991) 2 KAR 254** in urging this Court to even allow the appeal on this ground alone. On the submission that the *alibi* defence was not considered Counsel relied on **Peter Njuguna Muriu vs. Republic (1982-88) KAR 376** and **GOO vs. Republic (2016) eKLR.** On sentence Counsel relied on **Samuel Achieng Alego vs. Republic (2018) eKLR** and **Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR**. The Appellant prayed that the appeal be allowed,

conviction quashed and sentence set-aside.

8. **Mr. Kimanthi** Senior Principal Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any peradventure and that none of the grounds tendered are holding. Counsel prayed that the appeal be dismissed.

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions. I must say that the prosecution's evidence as well as the defence were well captured in the judgment under appeal which evidence I herein incorporate by way of reference.

11. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. I will consider each of them separately

(a) On the age of the complainant:

12. The age of the complainant was not contested in this appeal. However, the issue was well settled by the trial court which relied on the complainant's Certificate of Birth No. [xxxx] which gave the date of birth as 03/04/2009. The complainant was hence 8 years 2 months at the time of the alleged offence. The complainant was hence a minor of tender age within the meaning of the law.

(b) On the issue of penetration:

13. **Section 2** of the **Sexual Offences Act** defines '**penetration**' as: ***the partial or complete insertion of the genital organs of a person into the genital organ of another person.***

14. This position was fortified in the case of **Mark Oiruri Mose vs R (2013) eKLR** when the Court of Appeal stated thus:

> ***…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….***
>
> (emphasis added).

15. Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration:

> ***In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.***

16. Penetration is hotly contested. The Appellant contends that there was no evidence of penetration and that the trial court erred in relying on the sole testimony of the complainant which was not even corroborated. He further contends that the medical evidence was wanting and could not prove penetration.

17. The witnesses testified before the trial court and the court had an opportunity of observing their demeanour. Whereas an appellate Court is to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter, it must always bear in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and it should give allowance for that. The trial court evaluated the evidence of the witnesses and said the following about the complainant: -

> ***…...I am thus convinced that her evidence was credible and she was telling the truth…...***

18. Be that as it may, the complainant narrated the events that unfolded on the 21/06/2017. She stated that on return from school and as she was playing the assailant appeared and asked her to accompany him to the shopping center but she declined. Instead she accompanied the assailant to the house of one Ukutu. Before reaching the assailant grabbed her and pulled her into the nearby sugarcane plantation where the assailant removed her skirt and pant and engaged in what she clearly described to be a physical sexual act with the assailant. The complainant stated that she did not scream as the assailant threatened her with death and warned her not to tell anyone of what had happened. The complainant kept the secret, but could not go to school the following day due to emergent pains. That she later told PW2 of what happened. That is the evidence which the trial court believed. On my part I find the testimony of the complainant straight-forward and more or less unchallenged in cross-examination. I hence do not find anything to make me arrive at an adverse finding on the credibility of the evidence of the complainant.

19. There is also the testimony of PW2. According to PW2 the incident took place on a Thursday 22/06/2017 and the complainant did not go

to school on 23/06/2017 which was a Friday. That, on Saturday the complainant told PW2 that she had muscle pull on the upper thighs and on Sunday morning PW2 found the complainant washing her under pant which was soiled with puss and confronted her thereby leading to the revelation.

20. PW3 testified that PW2 told him of the complainant's sexual encounter on 25/06/2017 and that the complainant had been sexually assaulted on 21/06/2017. That, on 22/06/2017 the complainant did not go to school, but went on 25/06/2017.

21. I note the variance on the dates in the testimonies of PW2 and PW3. Whereas that is the case the evidence of PW2 perfectly settles issue as it gives the exact days of the week as opposed to the dates. PW2 stated what transpired on Thursday, Friday, Saturday and the Sunday when the complainant disclosed the events of Thursday. I do not see how the Appellant suffered miscarriage of justice courtesy of the narration of PW2. In any event **Section 382** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya comes to play.

22. PW4 testified on how the complainant was examined and treated on 25/06/2017. He produced the P3 Form, the treatment notes and the Post Rape Care Form (PRF) as exhibits. The said exhibits had the detailed examination conducted on the complainant and the results thereof. PW4 physically examined the complainant 4 days post the incident. A laboratory high vaginal swab examination was also carried out. The examination revealed old bruises on both *labias* which were covered with puss-like whitish vaginal discharge. The hymen was missing. PW4 formed the opinion that there had been a forced penile penetration into the complainant's vagina. PW2's testimony that she found puss on the complainant's underpants was hence confirmed by PW4.

23. On corroboration, the trial court in its judgment dealt with that issue at length and even referred to a decision of this Court. I wholly concur with the analysis and I have nothing meaningful to add thereto.

24. Whereas the testimony of PW4 did not connect the Appellant with the commission of the offence as submitted by the Appellant, the same coupled with the testimony of the complainant and PW2 went a long way into proving penetration. I therefore find no difficulty in holding, which I hereby do, that penetration into the complainant's vagina by a penis was proved.

c) <u>On whether the Appellant was the perpetrator:</u>

25. The issue of identification was also hotly contested. The Appellant contends that there was need for an identification parade to be conducted. There is no doubt that the Appellant's father and PW3 are brothers. Therefore, the Appellant is a first cousin to the complainant. The families also live in the same neighbourhood. Further the incident took place during the day and the complainant narrated what happened as well as who the culprit was. Since the complainant knew the Appellant well there was no need of conducting an identification parade. (See the Court of Appeal in **<u>Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)</u>** among others).

26. There was also the contention that the time of the incident was not disclosed in evidence. That is so, but the complainant was clear that the incident took place during the day and that she could clearly see. I therefore find that the failure to state the time of the offence in the unique circumstances of this case is not fatal to the prosecution's case. Likewise, I do not see how the Appellant suffered miscarriage of justice and in any event **Section 382** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya cures the lacuna.

27. The complainant also readily gave the name of the Appellant when she was confronted by PW2. She also consistently revealed the Appellant's name to PW3 and the police thereby sealing any doubt as to whom the complainant referred to. The assailant was also identified before the trial court. (See the Court of Appeal in **<u>Simiyu & Another vs. R. (2005) 1 KLR 192</u>**, **<u>R. vs. Alexander Mutuiri Rutere alias Sanda & Others (2006) eKLR</u>**, **<u>Lesarau vs. R. (1988) KLR 783</u>**, **<u>Morris Gikundi Kamunde vs. Republic (2015) eKLR</u>** among others).

28. On the *alibi* defense, it was hotly contested that the trial court did not consider the same in its decision under appeal. I have carefully gone through the impugned judgement and whereas the trial court did not outrightly deal with the issue of the *alibi* defence the court analyzed the entire body of evidence and placed the Appellant at the scene of crime and as the assailant. In essence the defence was considered. Be that as it may, I have re-considered the *alibi* defence in light of the prosecution's case and I am equally satisfied that the Appellant was properly placed at the scene of crime and as the perpetrator. I say so because the testimony of the complainant is unchallenged, remains credible and believable and withstands the test of **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya.

29. Closely related to the *alibi* defense is the contention that the Appellant was fixed out of a grudge with PW2 and PW3. The Appellant raised the issue of the grudge at the tail end of the proceedings when he tendered his defence. That in itself denied the prosecution the opportunity to appropriately challenge it and remains in contravention of **Article 50** of the **Constitution**. Without being seen as shifting the legal burden of proof, suffice to say that the Appellant did not raise the issue with any of the prosecution witnesses or at all and that is why the trial court rightly so described the alleged grudge as an afterthought.

30. From the foregone analysis I have no doubt in my mind that there were no circumstances that may have led to any doubtful recognition of the Appellant by the complainant and as such the identification of the Appellant as the aggressor was not in error. I now find and hold that the prosecution proved that it was the Appellant who sexually assaulted the complainant. The third ingredient of the offence of defilement is also answered in the affirmative.

31. The Appellant further raised the issue of the defectivity of the charge. He argued that the Appellant was charged under a non-existent **Section 8(1)(2)** of the **Sexual Offences Act**. It is true the said section of the law *stricto sensu* does not exist. A proper charge should have been drafted as *'Defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act'***. However, the issue is now settled courtesy of the Court of Appeal in **<u>Nyamai Musyoki vs. Republic (2014) eKLR</u>** where the Court expressed itself thus: -

> ***In this case as was rightly pointed out by the Learned Judge, the Appellant was charged under Section 8(1)(3) of the Sexual Offences Act. This was evidently a misdirection of the section creating the offence and it is apparent to us that the police intended***

to charge the appellant under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The prevailing question however is whether this prejudiced him in any way. It is our finding that this was a minor technical defect and it is clear from the record that all other procedures were followed to the letter and the appellant was accorded a fair hearing and he understood the charge that was facing him. His full participation in the trial process vindicated that position. If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes to the root of the charge distorting it in a way that the accused cannot understand the charge, then the Court ought to be reluctant to apply Section 382 CPC to cure the defect. In this case, we agree with the Learned Judge that the defect did not prejudice the appellant in any manner and the invocation of Section 382 CPC was proper in the circumstances.

32. I must however state that the said decision was rendered way back in 2014 and it seems the prosecution is yet to curb the defectivity. Whereas the police prefer charges it is the Office of the Director of Public Prosecutions which approves and presents the charges before Courts. It is therefore upon the Office of the Director of Public Prosecutions to ensure that proper charges are preferred and presented. It is my hope that this form of defectivity in charge sheets, which is indeed prevalent, shall be arrested sooner than later.

33. In sum I find and hold that the Appellant was properly found guilty and convicted of the offence of defilement. The appeal on conviction hereby fails.

34. On **sentence**, the Appellant was sentenced to the mandatory life sentence under **Section 8(2)** of the **Sexual Offences Act**. The record is clear on that. I have previously dealt with the mandatory nature of sentences in **Migori High Court Criminal Appeal No. 58 of 2018 Morris Odero Nyangoko versus Republic** (unreported) and since I am still of that considered position I herein below reiterate what I stated therein: -

25. ……..The Sexual Offences Act No. 3 of 2006 is a pre-2010 statute and introduced a raft of mandatory, sole and/or minimum sentences in sexual offences. It is therefore one of those statutes which must be applied in light of the Constitution which was promulgated in 2010. The issue of mandatory and sole nature of sentences was well settled by the Supreme Court in the much celebrated case of Francis Muruatetu & Another -vs- Republic 2017 eKLR where the Court stated in part thus: -

> ***……****On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare Section 204 shall, to the extent it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision.*
>
> ***……..****Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right." (emphasis added).*

26. Applying the foregone reasoning, the Court of Appeal in Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR while considering an appeal against life sentence imposed under Section 8(2) of the Sexual Offences Act had the following to say: -

> ***…..****In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.*
>
> *Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic(supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.*

27. Section 8(1) and (2) of the Sexual Offences Act states as follows:

8(1). ……..

(2) ……..

28. It therefore goes without say that the mandatory life sentence imposed by Section 8(2) of the Sexual Offences Act cannot stand. However, that is not to say that a court cannot render a life sentence upon convicting an accused person where the victim is of the age of 11 years old and below. A court must always reserve its discretion to consider the circumstances of each case independently and set an appropriate sentence. What the Constitution contemplates is that the sentence of life imprisonment cannot be the only sentence as currently proclaimed by Section 8(2) of the Sexual Offences Act. A court has discretion to render a life sentence as one of the lawful sentences upon consideration of mitigations and properly directing its legal mind on the factors for consideration in sentencing. The appeal on sentence is hereby allowed for the reason that the trial court stated that it had no discretion in sentencing in view of the mandatory nature of Section 8(2) of the Sexual Offences Act. The life sentence is

hence set-aside.

29. To enable this Court arrive at a fair and a balanced sentence I am of the very considered view that this is a case where a Pre-Sentence Report ought to be considered. Given the power of this Court to take additional evidence on appeal I hereby direct that a Pre-Sentence Report be filed for consideration.

35. Likewise, I allow the appeal on sentence. The sentence of life imprisonment is hereby set-aside and the Appellant shall be re-sentenced. To that end, a Pre-Sentence Report shall be availed for consideration and sentencing on 07/08/2019.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 26th day of July 2019.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Oduk, Counsel for the Appellant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant